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06-36083

In The
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AL-HARAMAIN ISLAMIC FOUNDATION, INC., et al.,

Plaintiffs and Appellees,

vs.

GEORGE W. BUSH, President of the United States, et al.,

Defendants and Appellants.

RESPONSE OF APPELLEES TO APPELLANTS' MOTION FOR STAY OF THE DISTRICT COURT'S MARCH 13, 2007 ORDER, ETC. AND FOR AN IMMEDIATE, INTERIM STAY, ETC.

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INTRODUCTION

This litigation challenges the President's so-called "Terrorist Surveillance Program" (TSP), in which the Executive Branch has conducted warrantless domestic electronic surveillance for foreign intelligence purposes in violation of the Foreign Intelligence Surveillance Act (FISA).

Currently pending before this Court is a § 1292(b) interlocutory appeal challenging a district court order which partially rejected appellants' assertion of the state secrets privilege. Appellees have moved for partial summary judgment of liability under Federal Rule of Civil Procedure 56(c) or, alternatively, for partial summary adjudication of specific issues within claims under Rule 56(d), asking the district court to adjudicate two points: (1) whether a document (hereafter "the Document") that appellants accidently disclosed to appellees, and which appellees filed under seal with their complaint, demonstrates appellees' standing as actual victims of the TSP; and (2) whether, as appellants have publicly claimed in numerous written and oral statements, the President is authorized by "inherent authority," or by the Authorization for Use of Military Force Against Terrorists (AUMF) issued by Congress in 2001, to disregard FISA.

On March 13, 2007, the district court ordered appellants to file a written response to appellees' summary judgment motion by April 12, 2007, and scheduled the matter for oral argument on May 3, 2007. Appellants have now moved this court for a stay of the district court's March 13 order – and thus a stay of further proceedings on the summary judgment motion – during the pendency of their interlocutory appeal.

This response by appellees explains why this Court should deny appellants' stay request: the district court retains jurisdiction over the issues raised in the summary judgment motion because those issues are not implicated by the interlocutory appeal; and all four factors for adjudicating a stay request compel denial of the request here.

DISCUSSION

I. THE DISTRICT COURT RETAINS JURISDICTION OVER THE ISSUES RAISED IN THE SUMMARY JUDGMENT MOTION BECAUSE THOSE ISSUES ARE NOT IMPLICATED BY THIS APPEAL.

A. The Issues Raised In This Appeal Are Largely The Same As Those Raised In the *Hepting* Appeal.

Appellants correctly observe that an interlocutory appeal "divests the district court of jurisdiction over the *particular issues* involved in that appeal." *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 886 (9th Cir. 2001) (emphasis added). In the present case, however, the "particular issues" raised on appellants' interlocutory appeal do not implicate *any* of the issues raised in appellees' summary judgment motion. Consequently, the district court retains jurisdiction to decide those issues during the pendency of the appeal.

The key point here is established in appellants' petition for interlocutory appeal, where they asked this Court to defer action on the petition until the Court's decision of the interlocutory appeal in *Hepting v. AT&T*, Nos. 06-80109, 06-80110 (9th Cir.). Appellants requested such deferral because "the Court's resolution of the issues in *Hepting* may govern or, at a minimum, significantly impact the state secrets issues in this petition," and the issues presented in the *Hepting* interlocutory appeal "largely parallel the issues presented here." *See* Appellants' Motion For Stay, Tab 4 at 18-19.

Thus, to determine what "particular issues" are raised in the present appeal – and hence whether any of those issues implicate the issues raised in the summary judgment motion – we must look to the *Hepting* appeal, since the issues in both appeals are largely the same. And now that appellants have filed their opening brief in the *Hepting* appeal, we know what "particular issues" appellants are raising there and thus in the present appeal – and hence which issues must be scrutinized to determine whether any of them implicate appellees' summary judgment motion.

As we next demonstrate, none of the issues appellants raise in the *Hepting* appeal – and hence in the present appeal – implicate the issues appellees raise in their summary judgment motion, which means the district court retains jurisdiction to decide the summary judgment issues.

B. The Summary Judgment Motion Does Not Raise The Issue Whether An Action Must Be Dismissed If It Is Premised On The Existence Of An Alleged Secret Espionage Relationship.

The first issue appellants raise in *Hepting* is whether an action must be dismissed if it is premised on the existence of an alleged secret espionage relationship. *See* Brief For United States in *Hepting v. AT&T* (hereinafter "Government's *Hepting* Brief") at 11, 17, citing *Totten v. United States*, 92 U.S. 105 (1875) and *Tenet v. Doe*, 544 U.S. 1 (2005). This issue does not implicate appellees' summary judgment motion because the present action is not premised on the existence of an alleged secret espionage relationship.

C. Adjudication Of The Motion Does Not Require Disclosure Of Any Information That Would Tend To "Confirm Or Deny" Alleged Secret Surveillance Activities.

The second issue appellants raise in *Hepting* is whether the state secrets privilege applies to this litigation because it requires disclosure of information that would tend to "confirm or deny" alleged secret surveillance activities, including matters pertaining to standing. *See* Government's *Hepting* Brief at 11, 33-34, 36. This issue does not implicate appellees' summary judgment motion because the motion's adjudication does not require any such disclosure.

The summary judgment motion seeks adjudication of two questions: (1) whether the Document demonstrates appellees' standing to bring this action as actual victims of the TSP; and (2) whether FISA, which requires a warrant for domestic electronic surveillance, is trumped as a matter of law by inherent Presidential authority or the AUMF.

Adjudication of the first question – standing – does not require appellants to "confirm or deny" anything. Because of the Document's accidental disclosure to appellees, they *already know* they were subjected to warrantless electronic surveillance, which thus is no longer a secret. There is no need for the Government to "confirm" what the appellees – and now the district court – already know. The district court can review the sealed materials on file in this case and determine whether they demonstrate appellees' standing. Appellants need not disclose state secrets to enable the district court to make that determination.

Similarly, adjudication of the second question – whether FISA is trumped by inherent Presidential authority or the AUMF – does not require appellants to "confirm or deny" anything. That question is *purely legal*. Its resolution requires nothing more than analysis of pertinent legal authorities, including the Constitution, statutes, and relevant case law – a point that becomes obvious upon review of the legal arguments asserted below in appellees' memorandum in support of the summary judgment motion. *See* Tab A to this Response at 9-32.

And even if standing must be fully litigated rather than determined as a matter of partial summary judgment of liability under Rule 56(c), the legal issue whether FISA is trumped by inherent Presidential authority or the AUMF can and should be summarily adjudicated under Rule 56(d) – partial summary adjudication of specific issues within claims – in order "to carve out threshold claims and thus streamline further litigation" by "efficiently separat[ing] the legal issues from the factual ones." *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987); *see* Tab A at 32-33.

D. Adjudication Of The Motion Does Not Require Disclosure Of Any Information Concerning The "Reasons For" Or The "Method And Means Of" The Warrantless Surveillance Program.

The third issue appellants raise in *Hepting* is whether the state secrets privilege applies to this litigation because it requires disclosure of information concerning the "reasons for" and the "method and means of" the TSP. *See* Government's *Hepting* Brief at 12, 14. Those points are irrelevant to the issues raised in the summary judgment motion.

The first point – the *reasons* for the TSP – goes to the Government's *motive* for violating FISA. Here is how appellants explained this point below: "The continuing and urgent al Qaeda threat is the *very reason* the United States is undertaking the intelligence activities implicated by this case," and "information concerning the nature and severity of the continuing al Qaeda terrorist threat," including "what the government may know about Al Qaeda's plans," cannot be disclosed without jeopardizing national security. Defs.' Memo In Support Of U.S. Assertion Of State Secrets Privilege (hereinafter "Defs.' State Secrets Memo") at 16 (emphasis added).

But secret information about the nature and severity of the al-Qaeda threat need not be disclosed *at all* in this case. The ultimate issue to be decided is whether appellants "intentionally" engaged in warrantless electronic surveillance in violation of FISA. *See* 50 U.S.C. §§1809-1810. The "very reason" for appellants' conduct – that is, their motive – is irrelevant to the issue of their intent. *See, e.g., United States v. Lake*, 709 F.2d 43, 45 (11th Cir. 1983).

Thus, for example, in *Abraham v. County of Greenville*, 237 F.3d 386, 390-91 (4th Cir. 2001) – a civil action for unlawful electronic surveillance in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2511 *et seq.*, which governs electronic surveillance for criminal law enforcement – the Fourth Circuit held that a violation of Title III cannot be excused by the defendant's "good faith." And in *In re Pharmatrak, Inc.*, 329 F.3d 9, 23 (1st Cir. 2003) – a civil action for intentional interception of electronic communications in violation of the Electronic Communications Privacy Act, 18 U.S.C. §2511 *et seq.* – the First Circuit noted that "liability for intentionally engaging in prohibited conduct does not turn on an assessment of the merit of a party's motive."

Similarly here, the nature and severity of the al-Qaeda threat as the motive for the TSP is irrelevant to the question whether appellants intentionally violated FISA. Appellants' attempt to justify their conduct is reminiscent of the proverbial plea of "guilty with an explanation." The "explanation" is irrelevant to the determination of guilt. The President may not violate the law, no matter what his motivations may be. Thus, appellants' liability for violating FISA can be determined without requiring any disclosure of secret information about al-Qaeda.

The second point – the *method and means* of the TSP – goes to details of *how* persons were surveilled, not the *fact* of their surveillance. Appellants claimed below that information about the method and means of the TSP – "how it actually operates in a given case" – cannot be disclosed without jeopardizing national security. Defs.' State Secrets Memo at 19, citing *El-Masri v. Tenet*, 437 F.Supp.2d 530 (E.D. Va. 2006).

But the determination whether the TSP violates FISA does not require disclosure of any details about the manner of appellees' surveillance – such as the technology by which the surveillance was accomplished – any more than a murder conviction requires proof of which finger the murderer used to pull the trigger. Thus, for example, in *United States v. United States District Court (Keith)*, 407 U.S. 297, 315-321 (1972), the Supreme Court did not have to delve into the details of how the FBI was conducting domestic intelligence surveillance in order to determine whether it was unlawful.

That makes *El-Masri v. Tenet* inapposite, for in that case the district court found it necessary to dismiss the action in order to protect the secrecy of "operational details" concerning the "means and methods" of the challenged government conduct.

See 437 F.Supp.2d at 537-38. Here, in contrast, the determination whether the TSP is unlawful requires no disclosure of the program's operational details. The merits issues here – whether FISA is trumped by inherent Presidential power or the AUMF – are purely legal.

E. The Motion Can Be Adjudicated Solely On Authoritative Government Statements.

The last issue appellants raise in *Hepting* is whether the state secrets privilege restricts consideration of facts concerning the TSP to authoritative government statements. *See* Government's *Hepting* Brief at 21. This issue does not implicate the merits issues in appellees' summary judgment motion because appellees' arguments on those issues *are* based solely on authoritative government statements – specifically, public statements in press conferences and in a radio address by President George W. Bush, Attorney General Alberto Gonzales, Principal Deputy Director of National Intelligence Michael Hayden, and Assistant Attorney General William E. Moschella, and in the Department of Justice's 42-page "White Paper" describing the TSP and explaining appellants' legal theories in support of the program. *See* U.S. Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described By the President* (Jan. 19, 2006) (http://www.fas.org/irp/nsa/doj011906.pdf).

* * * * *

In short, because this interlocutory appeal does not implicate any of the issues raised in the summary judgment motion, the district court retains jurisdiction over those issues. That means the stay appellants request is not a matter of jurisdiction, but is *discretionary* with this court.

II. ALL FOUR FACTORS FOR ADJUDICATING A STAY REQUEST COMPEL DENIAL OF APPELLANTS' REQUEST.

A. The Pertinent Factors For Deciding Whether To Grant A Stay Are Whether (1) Appellants Have A Strong Likelihood Of Success On The Summary Judgment Motion, (2) Appellants Would Sustain Irreparable Harm Absent A Stay, (3) A Stay Would Not Prejudice Appellees, And (4) The Public Interest Favors A Stay.

Appellants correctly identify the factors this Court must consider in determining whether to exercise its discretion to grant a stay: (1) whether appellants have a *strong likelihood of success* on the summary judgment motion; (2) whether appellants will suffer *irreparable harm* absent a stay; (3) whether a stay would *prejudice appellees*, and (4) where the *public interest* lies. *See, e.g., Baker v. Adams County/Ohio Valley School Board*, 310 F.3d 927, 928 (6th Cir. 2002); *cf. Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 551 (9th Cir. 1977) (same factors for preliminary injunction). Each of these factors, however, *disfavors* a stay in this case.

B. Appellants Have Not Even Attempted To – And Cannot – Demonstrate A Strong Likelihood Of Success On The Summary Judgment Motion.

Appellants have not even attempted to demonstrate that they have a strong likelihood of success on the merits of appellees' summary judgment motion – *i.e.*, whether FISA is trumped by inherent Presidential authority or the AUMF. At first blush, that might seem surprising, since the Government has gone to great lengths to set forth in the "White Paper" its two legal theories in support of the TSP. However, upon review of appellees' memorandum below in support of the summary judgment motion, *see* Tab A, as compared with the "White Paper," it will become obvious why appellants have ignored this critical factor – *appellees*, not appellants, have the stronger arguments on the merits.

In a nutshell, appellants' assertion of inherent Presidential authority is precluded by *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which establishes that, according to our Constitution's separation of powers and its system of checks and balances, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress" – here, as expressed in FISA – "his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* at 637 (Jackson, J., concurring). The Supreme Court recently reiterated this point in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), which held that military commissions established by the President to try Guantanamo Bay detainees violated the Uniform Code of Military Justice (UCMJ). The Supreme Court said the President lacked inherent power to "disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers" through the UCMJ. *Id.* at 2774. Likewise here, because Congress has, through FISA, placed limitations on the President's power to conduct domestic electronic surveillance for foreign intelligence purposes by imposing a warrant requirement, the President lacks authority to disregard that requirement. (For a complete discussion of this point, *see* Tab A at 18-23.)

Appellants' reliance on the AUMF is likewise meritless. In a nutshell, there are at least six reasons why the AUMF does not trump FISA: (1) the AUMF authorizes only the use of force as an incident of waging war on the battlefield, which does not include domestic electronic surveillance; (2) post-9/11 Congressional amendments to FISA demonstrate that Congress never intended to authorize foreign intelligence electronic surveillance outside the structure of FISA; (3) FISA is expressly designated as the exclusive means by which such surveillance is to be conducted; (4) this specific designation governs over the AUMF's general provisions; (5) appellants' reliance on the AUMF runs afoul of the rule of statutory construction disfavoring repeal (here, of FISA's warrant requirement) by implication; and (6) the TSP exceeds the AUMF's scope. (For a complete discussion of these points, *see* Tab A at 12-17.)

Appellants' complete failure to address their likelihood of success on these issues speaks volumes.

C. There Is No Danger Of Irreparable Harm Because The Issues Raised In The Summary Judgment Motion Can Be Decided Without Any Disclosure Of State Secrets.

Appellants contend they and the Nation would be irreparably harmed by proceedings on the summary judgment motion because such proceedings "would necessarily risk disclosure of sensitive and highly classified information." Appellants' Motion For Stay at 15-16. As explained above, however, the motion's adjudication does not require *any* disclosure of state secrets. The district court can decide the standing question simply by reviewing the sealed materials already on file, and the merits issues are purely legal, requiring nothing more than analysis of pertinent legal authorities.

Appellants worry that if the summary judgment motion goes forward, they will be forced to provide "an incomplete defense" against the motion by litigating "without recourse to classified information." Appellants' Motion For Stay at 13. But if that proves to be true, then appellants will have an adequate remedy by subsequent appeal – whether interlocutory under § 1292(b) or upon a final judgment – where this court can decide whether appellants were deprived of the opportunity to present a complete defense. Thus, appellants can readily litigate the summary judgment motion *now* without jeopardizing either national security or their ultimately ability to defend against this litigation.

Indeed, appellants have indicated that, if this Court denies a stay, they will refuse to respond *at all* to the summary judgment motion, other than to re-assert the state secrets privilege. *See* Appellants' Motion For Stay at 16-17 ("to respond to plaintiffs' motion, the Government will now have to reassert" the state secrets privilege). That seems a strange tactical decision, given the fact that the "White Paper" has already publicly set forth the Government's legal justifications for the TSP – the very merits issues presented in the summary judgment motion. This tactic suggests, however, that appellants are well aware they can avoid any purported irreparable harm by refusing to litigate the merits of the summary judgment motion and then obtaining relief on a subsequent appeal challenging a ruling against them on the merits.

Moreover, the Government's *Hepting* brief effectively *concedes* that the issue of inherent Presidential power can be litigated without revealing state secrets, by *arguing the merits* of that issue. In a seven-page discussion replete with citation of legal authorities, the Government argues, among other things, that (1) "[t]he President has inherent constitutional authority . . . to conduct warrantless surveillance of communications involving foreign powers such as al Qaeda and its agents," (2) "even in peacetime, the President has inherent constitutional authority to conduct warrantless surveillance of foreign powers within or without the United States," and

(3) "Congress may not 'impede the President's ability to perform his constitutional duty.'" Government's *Hepting* Brief at 38, 42. The Government freely makes these arguments without any need to reveal state secrets. And the Government's "White Paper" publicly presents these arguments in even greater detail – again, without any need to reveal state secrets. Plainly, the Government believes it can try the issue of inherent Presidential power in the court of public opinion without revealing state secrets. If that is true, then the Government certainly can do so in a court of law.

The Government's *Hepting* brief blows hot and cold, arguing the merits of the claim to inherent Presidential power yet insisting at the same time that the issue cannot be decided without revealing state secrets concerning the "reasons for" and "method and means of" the TSP. *See* Government's *Hepting* Brief at 43. But the Government cannot have it both ways. If the Government can argue the merits of this issue without revealing state secrets – and plainly the Government thinks it can, given its arguments in the White Paper and in its *Hepting* brief – then the Government cannot reasonably invoke the state secrets privilege as a basis for evading a judicial determination of the issue. And, as demonstrated above, a decision on the merits does not even require information concerning the "reasons for" and "method and means of" the TSP.

D. A Stay Would Prejudice Appellees Because Of The Threat Of Ongoing Unlawful Surveillance.

Appellants contend a stay would not prejudice appellees because the TSP purportedly has ended and thus there is no threat that they will be subjected to further unlawful surveillance. *See* Appellants' Motion For Stay at 17-18. This claim is, in effect, one of mootness with regard to the portion of this lawsuit seeking injunctive relief. The problem with this claim is that appellants have failed to demonstrate such mootness.

A defendant's "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (citations omitted); see *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968) (defendant's voluntary cessation of conduct does not compel court to "leave 'the defendant . . . free to return to his old ways'") (quoting *W.T. Grant Co.*, 345 U.S. at 632). To the contrary, a defendant's voluntary cessation of challenged activity moots a suit only "if subsequent events ma[k]e it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 428 U.S. 167, 189-90 (2000) (quotation marks omitted). A party asserting mootness has a "heavy burden" in attempting to meet this standard. *Adarand Constructors, Inc. v. Slater*, 528 U.S.

216, 221-22 (2000).

Here, appellants have failed to demonstrate mootness because they have refused to disclose the FISA court orders that they claim have resulted in mootness. *See* Appellants' Motion For Stay at 5, n. 2. We do not know, therefore, whether the Government's ongoing surveillance in fact complies with FISA. Moreover, appellants continue to insist that the President has inherent authority to conduct warrantless surveillance outside the structure of FISA. Therefore, nothing prevents the Government from ignoring FISA's requirements and resurrecting the TSP at any time.

Accordingly, it is far from clear that the Government has ceased its unlawful conduct, or that the conduct "could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189-90 (quotation marks omitted). In short, the Government has failed to satisfy its heavy burden of showing mootness. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-89 (rejecting mootness challenge to ordinance repealed during litigation because repeal "would not preclude [the city] from reenacting precisely the same language if the District Court's judgment were vacated").

In other words, a stay would indeed prejudice appellees by exposing them to a renewed threat of unlawful surveillance.

E. The Public Interest Favors Expeditious Resolution Of The Profoundly Important Constitutional Issues Raised In The Summary Judgment Motion.

Finally, appellants argue that the need to protect state secrets amounts to a public interest in staying proceedings on the summary judgment motion. *See* Appellants' Motion For Stay at 15-16. This argument, however, is undermined by the fact that adjudication of the motion does not require disclosure of any state secrets.

Moreover, another public interest is at stake here – the public interest in an expeditious resolution of the constitutional issues raised in the summary judgment motion. This case presents one of the most important constitutional issues of our time – whether the President has inherent authority to disregard Congressional legislation in the name of national security. At stake is nothing less than "the equilibrium established by our constitutional system" between three separate but interdependent branches of government. *Youngstown Sheet & Tube Co.,* 343 U.S. at 638 (Jackson, J., concurring). "Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the constitution's three-part system is designed to avoid." *Hamdan*, 126 S.Ct. at 2800 (Kennedy, J., concurring). There is no greater public interest than in ensuring that America's highest officeholder is faithful to the law of the land. In fighting the war on terror, "the Executive is bound to comply with the Rule of Law." *Hamdan*, 126 S.Ct. at 2798.

This public interest demands expeditious resolution of the President's extraordinary claim of inherent authority to disregard Congress – not the sort of maneuvering in which appellants are engaging in an attempt to evade a decision on the merits. The American people deserve no less.

III. THIS COURT SHOULD DENY AN "IMMEDIATE, INTERIM STAY" BECAUSE APPELLANTS HAVE FAILED TO COMPLY WITH CIRCUIT RULE 27-3.

Lastly, we address appellants' request for what they call an "immediate, interim stay" pending the Court's decision on their stay motion. *See* Appellants' Motion For Stay at 3, 20. It is unclear whether appellants mean to make this request as an "emergency" motion (relief needed in less than 21 days) or as an "urgent" motion (relief not needed within 21 days) under Ninth Circuit Rule 27-3. In either case, however, the request does not comply with Circuit Rule 27-3.

As an "emergency" motion, the request is deficient because it does not include the "certificate of counsel" required by Circuit Rule 27-3(a)(3). Also, the request was not made "at the earliest possible time" as required by Circuit Rule 27-3(a)(1), appellants having waited a full *two weeks* after the district court's order before filing the request.

As an "urgent" motion, the request is deficient because it does not state any "date or event by which action is necessary" as required by Circuit Rule 27-3(b)(3).

Of course, there is no "emergency" or "urgency" at all. Appellants have indicated that if the district court proceeds on the summary judgment motion, they will simply oppose it by asserting the state secrets privilege and will *not* disclose any state secrets in filing written opposition or presenting oral argument, which means there is no immediate threat of irreparable harm to national security.

CONCLUSION

For the foregoing reasons, this Court should deny appellants' motion for a stay as well as their request for an "immediate, interim stay" pending consideration of the motion.

March 28, 2007

Respectfully submitted,

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IN THE UNITED STATES DISTRICT
FOR THE DISTRICT OF OREGON

AL-HARAMAIN ISLAMIC FOUNDATION, INC., *et al.*, Plaintiffs, v. **GEORGE W. BUSH**, *et al.*, Defendants.	)	Case No. CV 06-274-KI **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT OF LIABILITY OR, ALTERNATIVELY, FOR PARTIAL SUMMARY ADJUDICATION OF SPECIFIC ISSUES WITHIN CLAIMS**

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INTRODUCTION

This lawsuit challenges defendants' warrantless electronic surveillance of plaintiffs Al-Haramain Islamic Foundation, Inc. and two of its lawyers, plaintiffs Wendell Belew and Asim Ghafoor. By this motion, plaintiffs seek a partial summary judgment of liability pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, restricting discovery and trial to the quantum of plaintiffs' damages. Alternatively, plaintiffs seek a partial summary adjudication of issues within plaintiffs' claims pursuant to Rule 56(d) of the Federal Rules of Civil Procedure – specifically, the purely legal issues whether defendants' warrantless surveillance program violates the Foreign Intelligence Surevillance Act (FISA), the constitutional separation of powers, the First and Fourth Amendments, and the International Covenant on Civil and Political Rights. Partial summary adjudication will either put an immediate end to this case or streamline the case for limited discovery and trial.

FACTUAL BACKGROUND

Shortly after the terrorist attacks of September 11, 2001, President George W. Bush authorized a secret program for the National Security Agency (NSA) to engage in warrantless electronic surveillance of international communications into and out of the United States where the NSA believes that one of the participants is somehow affiliated with or working in support of al-Qaeda. Concise Statement of Material Facts ¶ 1 [hereinafter, "CSMF"]. The President has reauthorized this program more than 30 times and intends to continue reauthorizing it. CSMF ¶ 2.

Under the warrantless surveillance program, the NSA intercepts electronic communications without probable cause to believe a crime has been committed, solely upon the NSA's belief that one of the participants is somehow affiliated with or working in support of al-Qaeda. CSMF ¶¶ 1 & 3. Under the program, the NSA intercepts – for collection, retention and dissemination – electronic communications that are subject to the requirements of FISA, which Attorney General Alberto Gonzales has said "requires a court order before engaging in this kind of surveillance." CSMF ¶ 4. The program does not comply with the requirements of FISA. According to General Michael Hayden, it is conducted "in lieu of" FISA, is "more aggressive" than FISA, and is "quicker and a bit softer than FISA." CSMF ¶ 5.

Under the program, the NSA intercepts electronic communications without obtaining a warrant or any other type of judicial authorization. The surveillance occurs solely upon a decision by an employee of the NSA and approval by an NSA shift supervisor. CSMF ¶ 6.

On numerous occasions in March and April of 2004, pursuant to the program, the NSA conducted warrantless electronic surveillance of the contents of communications between, on one end, a director of plaintiff Al-Haramain Islamic Foundation, Inc. (an Oregon nonprofit corporation) while the director was located outside the United States and, on the other end, plaintiffs Wendell Belew (a United States citizen) and Asim Ghafoor (a United States citizen) while they were located inside the United States. CSMF ¶ 7.

SUMMARY OF ARGUMENT

As a matter of undisputed material fact, plaintiffs were victims of defendants' warrantless electronic surveillance program and thus have standing to sue. The document filed under seal with the complaint, along with declarations filed under seal in support of this motion and the effect of a shifted burden of proof in this case, demonstrate that plaintiffs' electronic communications were intercepted without a warrant on numerous occasions in March and April of 2004.

As a matter of law, defendants' warrantless surveillance program violates the Foreign Intelligence Surveillance Act (FISA), which prohibits domestic warrantless electronic surveillance to acquire foreign intelligence information. Both of defendants' asserted justifications for violating FISA – the 2001 Authorization for Use of Military Force (AUMF) and so-called "inherent presidential power" – are meritless. The warrantless surveillance program is within the intended scope of FISA and exceeds the intended scope of the AUMF. The program violates the constitutional separation of powers by exceeding the scope of presidential power, which is at its lowest ebb here because the program is incompatible with the will of Congress as expressed through FISA. The program also violates the Fourth Amendment for want of any special need for proceeding without warrants, the First Amendment as an infringement on expressive activity, and the International Covenant on Civil and Political Rights as a violation of international human rights law.

Because of (1) the undisputed material fact that plaintiffs were victims of the warrantless surveillance program, and (2) the program's statutory and constitutional illegality as a matter of law, plaintiffs are entitled to a partial summary judgment of liability, as authorized by Rule 56(c) of the Federal Rules of Civil Procedure. The only issues that need to be tried pertain to the quantum of plaintiffs' damages (e.g., the precise number of times plaintiffs were unlawfully surveilled).

Alternatively, if this Court denies partial summary judgment of liability, the Court should summarily adjudicate the legal issues presented by plaintiffs' FISA, constitutional and international law claims, as authorized by Rule 56(d) of the Federal Rules of Civil Procedure. Partial summary adjudication of these issues is the most efficient way for this Court to proceed because it will either (1) put an immediate end to this case, if the summary adjudication is in defendants' favor, or (2) streamline further litigation by narrowing the scope of discovery and trial to disputed fact issues, if the summary adjudication is in plaintiffs' favor.

ARGUMENT

I.

THIS COURT MAY SUMMARILY DECIDE LIABILITY OR SPECIFIC ISSUES WITHIN A CLAIM.

A. Rule 56(c) Authorizes Partial Summary Judgment Of Liability On Plaintiffs' Claims.

Under Rule 56 of the Federal Rules of Civil Procedure, a party may move for summary judgment "upon all or *any part*" of a claim. Fed. R. Civ. P. 56(a) (emphasis added). The "any part" phrase in Rule 56(a) authorizes what is commonly called "partial summary judgment." *See, e.g., American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 729 (7th Cir. 1986).

One form of partial summary judgment is on the issue of *liability*. A partial summary judgment of liability is authorized by Rule 56(c), which states that summary judgment "may be rendered on the issue of liability alone." Fed. R. Civ. P. 56(c). In such instances, the case proceeds to trial solely on the quantum of damages. *See, e.g., Pacific Fruit Express Co. v. Akron, Canton & Youngstown R. R. Co.*, 524 F.2d 1025, 1029-30 (9th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976).

By this motion, plaintiffs seek a partial summary judgment of liability, based on showings that (1) plaintiffs were actual victims of defendants' warrantless surveillance program and thus have standing to sue, and (2) defendants are liable under the Foreign Intelligence Surveillance Act (FISA), the constitutional separation of powers, the First and Fourth Amendments, and the International Covenant On Civil and Political Rights.

B. Rule 56(d) Authorizes Partial Summary Adjudication Of Specific Issues Within Plaintiffs' Claims.

Another form of partial summary judgment is on *specific issues within a claim*. This is authorized by Rule 56(d), which states in pertinent part: "If on motion under this rule judgment is not rendered upon the whole case or all the relief asked and a trial is necessary, the court . . . shall if practicable ascertain what material facts exist without substantial controversy . . . [and] shall thereupon make an order specifying the facts that appear to be without substantial controversy . . . ." Fed. R Civ. P. 56(d). Rule 56(d) contemplates "an adjudication of less than the entire action" through a pretrial determination "'that certain issues shall be deemed established for the trial of the case.'" 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2737 (3d ed. 1998) [hereinafter, "Wright, Miller & Kane"] (quoting 1948 Advisory Committee Note to Rule 56).

A partial summary judgment under Rule 56(d) is commonly called a "partial summary adjudication." *See, e.g., First National Insurance Co. v. Federal Deposit Insurance Corp.*, 977 F.Supp. 1051, 1055 (C.D. Cal. 1997); *Shyda v. Director, Bureau of Alcohol, Tobacco and Firearms*, 448 F.Supp. 409, 411 (M.D. Pa. 1977); Wright, Miller & Kane, § 2737. This procedure is used "to carve out threshold claims and thus streamline further litigation" by "narrow[ing] the issues, shorten[ing] any subsequent trial by months, and efficiently separat[ing] the legal issues from the factual ones." *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987); *see, e.g., Bosley v. Medical Institute, Inc. v. Kremer*, 403 F.3d 672, 675-80 (9th Cir. 2005) (affirming partial summary adjudication on issues of commercial use and likelihood of confusion in trademark infringement and dilution claim); *California Sportfishing Protection Alliance v. Diablo Grande, Inc.*, 209 F.Supp.2d 1059, 1065 (E.D. Cal. 2002) (partial summary adjudication "may be appropriate on clearly defined, distinct issues"); *First National Insurance Co.*, 977 F.Supp. at 1055 (court may "grant summary adjudication as to specific issues if it will narrow the issues for trial"). Thus, Rule 56(d) may be used to adjudicate specific questions of law, "regardless of their complexity." *Crowder v. United States*, 255 F.Supp. 873, 874 (N.D. Cal. 1964).

The Rule 56(d) procedure "is designed to be ancillary to a motion for summary judgment" in that it is available "if a court finds that summary judgment cannot be granted because there are genuine issues of material fact to be tried." Wright, Miller & Kane, § 2737; *see California Sportfishing Protection Alliance,* 209 F.Supp.2d at 1065. If a court denies partial summary judgment, "the Court may still grant summary adjudication as to specific issues." *First National Insurance Co.,* 977 F.Supp. at 1055.

By this motion, as an alternative to partial summary judgment of liability if it is denied, plaintiffs request partial summary adjudication of all issues within plaintiffs' claims that this Court determines to be purely legal.

II.

PLAINTIFFS ARE ENTITLED TO PARTIAL SUMMARY JUDGMENT OF LIABILITY.

A. Plaintiffs Were Victims Of Defendants' Warrantless Surveillance Program.

As a matter of undisputed material fact, plaintiffs were actual victims of defendants' warrantless electronic surveillance program and thus have standing to bring this action. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (standing exists where plaintiffs suffered concrete, particularized and actual injury that is fairly traceable to defendant's conduct and likely will be redressed by a favorable decision).

The document filed under seal with the complaint in this case, along with the declarations filed under seal in support of this motion, demonstrate indisputably that the

NSA conducted *electronic surveillance* of the contents of communications between, on one end, a director of plaintiff Al-Haramain Islamic Foundation, Inc. while the director was located outside the United States and, on the other end, plaintiffs Wendell Belew and Asim Ghafoor while they were located inside the United States. **(For further discussion, see Sealed Supplemental Memorandum In Support Of Plaintiffs' Motion, § 1.)**

Whether defendants had a *warrant* for plaintiffs' electronic surveillance is a matter peculiarly within defendants' knowledge. Consequently, the burden shifts to defendants to prove that they had a warrant. *See, e.g., Campbell v. United States*, 365 U.S. 85, 96 (1961) ("the ordinary rule . . . does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary"); *National Communications Assn. v. AT & T Corp.*, 238 F.3d 124, 130 (2d Cir. 2001) ("all else being equal, the burden is better placed on the party with easier access to relevant information"); 9 J. Wigmore, Evidence § 2486, p. 290 (J. Chadbourn rev. ed. 1981) ("the burden of proving a fact is said to be put on the party who presumably has peculiar means of knowledge" (emphasis deleted)). Where, as here,

> 'the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party.' When a negative is averred in pleading, or plaintiff's case depends upon the establishment of a negative, . . . but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the other party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative.

United States v. Denver & Rio Grande Railroad Company, 191 U.S. 84, 92 (1903); *accord, United States v. Morton*, 400 F.Supp.2d 874, 879 (2005).

Defendants have not sustained that burden of proof in any of their previous public filings in this Court, and evidently defendants have not done so in any of their *ex parte* and *in camera* filings. Unless they do so now in opposition to this motion and demonstrate that they had a warrant for plaintiffs' electronic surveillance, this Court should conclude it is indisputable that defendants had no warrant. **(For further discussion, see Sealed Supplemental Memorandum In Support Of Plaintiffs' Motion, § 2.)**

The fact of plaintiffs' warrantless electronic surveillance puts before this Court the purely legal issues whether defendants' warrantless surveillance program is unlawful.

B. The Warrantless Surveillance Program Violates The Foreign Intelligence Surveillance Act (FISA).

1. FISA prohibits domestic warrantless electronic surveillance to acquire foreign intelligence information.

FISA provides a framework for the domestic use of electronic surveillance to acquire foreign intelligence information in the effort to protect the Nation against international terrorism, sabotage, and attack by a foreign power or its agents. 50 U.S.C. § 1801(e)(1). FISA requires the government to obtain a court order – that is, a warrant – in order to conduct electronic surveillance of a "United States person," meaning a citizen, resident alien or association of such persons. 50 U.S.C. § 1801(i). A federal officer must apply to a judge of the Foreign Intelligence Surveillance Court (FISC), which consists of 11 district court judges, for an order approving electronic surveillance under the provisions of FISA. 50 U.S.C. § 1804(a). The judge may issue the warrant upon a finding of "probable cause to believe that . . . the target of the electronic surveillance is a foreign power or an agent of a foreign power." 50 U.S.C. § 1805(a)(3). Attorney General Alberto Gonzales has publicly acknowledged that the President's warrantless surveillance program involves "electronic surveillance" within the meaning of FISA. *See* Alberto Gonzales, *Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence* (Dec. 19, 1995), exh. B, at 1 (statement that FISA requires a warrant for "this kind of surveillance").

Congress enacted FISA in 1978 as a response to past instances of abusive warrantless wiretapping by the NSA and the Central Intelligence Agency (CIA). As the House Permanent Select Committee on Intelligence explained at the time: "In the past several years, abuses of domestic national security surveillances have been disclosed. This evidence alone should demonstrate the inappropriateness of relying solely on executive branch discretion to safeguard civil liberties. . . . [T]he decision as to the standards governing when and how foreign intelligence electronic surveillance should be conducted . . . is one properly made by the political branches of Government together, not adopted by one branch on its own and with no regard for the other." H. Rep. No. 95-1283, at 21-22. Thus, the Senate Judiciary Committee explained, FISA was enacted "to spell out that the executive cannot engage in electronic surveillance within the United States without a prior Judicial warrant." S. Rep. No. 95-604(I), at 6.

There are three narrow exceptions to FISA's warrant requirement:

- The Attorney General may authorize emergency warrantless surveillance for up to 72 hours if necessary to get information "before an order authorizing such surveillance can with due diligence be obtained." 50 U.S.C. § 1805(f)(1). In such instances, a FISC judge must be informed of the decision to employ emergency electronic surveillance, and an application for a FISA warrant must be made "as soon as practicable" within the 72-hour period. 50 U.S.C. § 1805(f).

- The Attorney General may authorize warrantless electronic surveillance for up to one year upon certification that the surveillance is directed only at communications "between or among foreign powers" or non-spoken technical intelligence "from property or premises under the open and exclusive control of a foreign power." 50 U.S.C. § 1802(a)(1)(A).

- The President may authorize warrantless electronic surveillance "for a period not to exceed fifteen calendar days following a declaration of war by the Congress." 50 U.S.C. § 1811.

None of these three exceptions applies here. The President's warrantless electronic surveillance program has taken place entirely outside the framework of FISA.

FISA warrants are freely granted. Department of Justice statistics indicate that, between 1978 and 2004, the government submitted some 19,000 surveillance applications to the FISC, which denied only four of those applications. *See* FISA Annual Reports to Congress 1979-2004, *at* http://www.fas.org/irp/agency/doj/fisa/#rept.

FISA imposes criminal penalties for its violation, making it an offense to "engage[] in electronic surveillance under color of law except as authorized by statute."

50 U.S.C. § 1809(a)(1). The offense "is punishable by a fine of not more than $10,000 or imprisonment for not more than five years, or both." 50 U.S.C. § 1809(c). FISA also imposes civil liability for its violation. Victims of unlawful electronic surveillance "shall have a cause of action against any person who committed such violation" and may recover actual damages, punitive damages, and reasonable attorney's fees and costs. 50 U.S.C. § 1810.

In a radio address by the President, at a press conference held by Attorney General Gonzales, and in a "White Paper" issued by the Department of Justice, defendants have expressly conceded that, shortly after September 11, 2001, the President authorized a secret program to engage in warrantless domestic electronic surveillance for foreign intelligence information where one party to the communication is outside the United States. *See* President Bush, Radio Address (Dec. 17, 2005), exh. A, at 1881; Alberto Gonzales, *Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence* (Dec. 19, 1995), exh. B, at 1; U.S. Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006), exh. I, at 1. This program violates FISA, and thus invokes FISA's criminal and civil penalties, absent some other law that trumps FISA.

2. The 2001 Authorization for Use of Military Force does not trump FISA.

The Department of Justice's White Paper claims FISA is trumped by the Authorization for Use of Military Force Against Terrorists (AUMF) issued by Congress on September 18, 2001, which states: "The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determined planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). The White Paper argues that because FISA makes it a crime to conduct electronic surveillance "except as authorized by statute," 50 U.S.C. § 1809(a)(1), and because the AUMF is a statute, the AUMF trumps FISA. *See* exh. I, at 10-17. There are at least six fatal flaws in this argument.

First, even if a statute like the AUMF could in theory trump FISA, the AUMF itself does not. The White Paper theorizes that, because the Supreme Court has interpreted the AUMF's phrase "necessary and appropriate force" as authorizing detention of enemy combatants captured on a battlefield abroad as a "fundamental incident of waging war," *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004), the AUMF should similarly be interpreted as authorizing domestic electronic surveillance as a fundamental incident of war. *See* exh. I, at 12-17. But *Hamdi* was limited to incidents of war *on the battlefield*, authorizing detention of persons who were "part of or supporting forces hostile to the United States or coalition partners *in Afghanistan and who engaged in an armed conflict against the United States there*." *Id.* at 516, emphasis added. *Hamdi* affords no excuse for domestic electronic surveillance off the battlefield and outside the framework of FISA. Indeed, *Hamdi* itself admonished that "a state of war is not a blank check when it comes to the rights of the Nation's citizens." *Id.* at 536. And, given FISA's provisions for court-ordered electronic surveillance upon a simple showing of probable cause to believe a target is a foreign power or agent thereof, 50 U.S.C. § 1805(a)(3), and for 72-hour emergency warrantless surveillance, 50 U.S.C. § 1805(f), the President's program can hardly be considered "necessary" or "appropriate" within the meaning of the AUMF.

Second, post-9/11 Congressional amendments to FISA demonstrate that Congress never intended to authorize foreign intelligence electronic surveillance outside the framework of FISA. Congress has twice amended FISA to accommodate post-9/11 needs – first by deleting a former requirement for certification that the primary purpose of a surveillance is to gather foreign intelligence information, 115 Stat. 272, §§ 206-108, 214-218, 504, 1003 (Oct. 26, 2001), and then by increasing the emergency warrantless surveillance period from 24 hours to 72 hours, 115 Stat. 1394, § 314(a)(2)(B) (Dec. 28, 2001). Yet Congress has never amended FISA to delete its warrant provisions, thus confirming that those provisions are intended to remain fully operational in governing foreign intelligence electronic surveillance. And there would have been no need for these amendments *at all* if the AUMF had already given defendants unlimited power to conduct warrantless foreign intelligence surveillance.

Third, the legislative history of FISA demonstrates that section 1809(a)(1)'s disclaimer of criminal liability for electronic surveillance "as authorized by statute" was intended to refer only to two statutory schemes – FISA itself and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.*, which governs electronic surveillance for criminal law enforcement. As the House Permanent Select Committee on Intelligence explained in its 1978 report on FISA, section 1809(a)(1) makes it a crime to engage in electronic surveillance "except as specifically authorized *in chapter 119 of title III* [of the Omnibus Crime Control and Safe Streets Act of 1968] *and this title*." H. Rep. No. 95-1283(I), at 96, emphasis added. Thus, the phrase "as authorized by statute" does not refer to statutes *other* than FISA and Title III, such as the AUMF. The White Paper's contrary construction of section 1809(a)(1) contradicts a statutory prescription that FISA and Title III "shall be the *exclusive* means by which electronic surveillance . . . may be conducted." 18 U.S.C. § 2511(f), emphasis added.

Fourth, the White Paper's reading of the AUMF runs afoul of the "commonplace of statutory construction that the specific governs the general." *Morales v. TWA, Inc.*, 504 U.S. 374, 384 (1992). The AUMF only generally authorizes "all necessary and appropriate force" against the perpetrators of the 9/11 attacks, Pub. L. No. 107-40, without even mentioning foreign intelligence surveillance. In contrast, FISA specifically commands that FISA and Title III "shall be the exclusive means by which electronic surveillance . . . may be conducted." 18 U.S.C. § 2511(f). The specific provisions of FISA, which are aimed precisely at the conduct challenged here, cannot be trumped by the general provisions of the AUMF. Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Gonzales v. Oregon*, 126 S. Ct. 904, 921 (2006) (citation and internal quotation marks omitted).

Fifth, the White Paper's reading of the AUMF also runs afoul of the rule of statutory construction disfavoring repeals by implication, which can be established only by "overwhelming evidence" that Congress intended the repeal. *J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 137 (2001). There is no such evidence here. To the contrary, Congress's post-9/11 amendments to FISA without deleting its warrant provisions plainly demonstrate intent *not* to repeal those provisions. And, indeed, Attorney General Gonzales has publicly admitted that Congress, if asked, would not have changed FISA's warrant provisions after 9/11, saying at a December 2005 press conference that "[w]e've had discussions with members of Congress . . . about whether or not we could get an amendment to FISA [to authorize warrantless electronic surveillance], and we were advised that that was not likely to be – that was not something we could likely get, certainly not without jeopardizing the existence of the program, and therefore, killing the program." Alberto Gonzales, *Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence* (Dec. 19, 1995), exh. B, at 7.

Sixth, even if *Hamdi v. Rumsfeld* is interpreted so expansively as to bring domestic electronic surveillance within the AUMF, the President's program still violates FISA because the program exceeds the AUMF's scope. The AUMF authorizes military force against *the perpetrators of the 9/11 terrorist attacks* – specifically, those who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons . . . ." In contrast, the President's program, as described in the White Paper, sweeps more broadly to include anyone who currently is "linked to al Qaeda or related terrorist organizations," regardless of whether such persons had anything to do with the 9/11 terrorist attacks or al-Qaeda itself. *See* exh. I, at 1. This is a distinction with a difference, because Congress rejected an initial White House draft of the AUMF which would have granted the President power to reach beyond the 9/11 perpetrators and al-Qaeda to the domestic sphere by more broadly authorizing him "to deter and pre-empt any future acts of terrorism or aggression against the United States." *See* Cong. Rec., 107th Cong., 1st sess., Oct. 1, 2001, pp. S9949-S995; Tom Daschle, *Power We Didn't Grant*, Wash. Post, Dec. 23, 2005, at A21.

The Supreme Court's recent decision in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), indicates that defendants' assertion of the AUMF as trumping FISA is destined for failure. In *Hamdan*, the Court held that military commissions established to try Guantanamo Bay detainees violated the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 801 *et seq.*, which prescribed a structure and procedures for trying the detainees. The Court said "there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in . . . the UCMJ." *Hamdan*, 126 S.Ct. at 2775. Similarly here, FISA prescribes a structure and procedures for conducting foreign intelligence surveillance, and there is nothing in the text or legislative history of the AUMF suggesting it was intended to trump FISA.

C. The Warrantless Surveillance Program Violates The Constitutional Separation Of Powers.

1. The program exceeds the scope of presidential power.

As another excuse for ignoring FISA, the White Paper makes a radically expansive claim of presidential "inherent power" to conduct domestic warrantless electronic surveillance for foreign intelligence purposes. *See* exh. I, at 6-10. This argument, too, is fatally flawed, for it is contrary to the constitutional separation of powers.

In *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952) – commonly called the *Steel Seizure Case* – Justice Robert Jackson's concurring opinion prescribed a formulation for determining the extent of presidential power according to our Constitution's separation of powers and its system of checks and balances. Justice Jackson observed that the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." *Id.* at 635. Thus, the extent of presidential power frequently depends on the presence or absence of Congressional action:

- "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.* at 635-37.

- "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637.

- "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* at 637.

This formulation is not tossed aside in times of war. "Whatever power the United States Constitution envisions for the Executive in exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi*, 542 U.S. at 536. "[T]he greatest security against tyranny . . . lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch." *Mistretta v. United States*, 488 U.S. 361, 381 (1989).

Here, presidential power is at its "lowest ebb" because Congress expressly prohibited electronic surveillance outside the framework of FISA and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, by making FISA and Title III "the *exclusive means* by which electronic surveillance . . . may be conducted." 18 U.S.C. § 2511(f) (emphasis added). This provision, added to Title III when FISA was enacted, replaced a pre-1978 provision, former 18 U.S.C. § 2511(3), which had stated that the President retained power "to obtain foreign intelligence information deemed essential to the security of the United States." *See* S. Rep. No. 95-604(I), at 64.

By repealing the former provision ceding foreign intelligence surveillance power to the President and replacing it with a provision making FISA and Title III the exclusive means for domestic electronic surveillance, Congress restricted the President's exercise of the inherent power defendants claim. The 39th President of the United States agreed to that restriction by signing FISA into law. "The President's ability to unfurl the banner of foreign affairs and use it to cloak sweeping investigative activities was brought to an end." *United States v. Andonian*, 735 F.Supp. 1469, 1474 (C.D. Cal. 1990), *aff'd and remanded on other grounds*, 29 F.3d 634 (9th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995). "The exclusivity clause makes it impossible for the President to 'opt-out' of the [FISA] legislative scheme by retreating to his 'inherent' Executive sovereignty over foreign affairs." *Id.*

Legislative history demonstrates that this curtailing of presidential power is precisely what Congress intended when enacting FISA. The House Conference Report on FISA said: "The intent of the conferees is to apply the [lowest ebb] standard set forth in" the *Steel Seizure Case*. H. Conf. Rep. No. 95-1720, at 35. The Senate Judiciary Committee said: "The basis for this legislation is the understanding . . . that even if the President has an 'inherent' constitutional power to authorize warrantless surveillance for foreign intelligence purposes, Congress has the power to regulate the exercise of this authority by legislating a reasonable warrant procedure governing foreign intelligence surveillance." S. Rep. No. 95-604(I), at 16.

This is not the first time that defendants have made their expansive claim of inherent presidential power as a basis for ignoring Congressional legislation. They did so in *Hamdan v. Rumsfeld* when attempting to evade the UCMJ's provisions for trying the Guantanamo Bay detainees. The Supreme Court rejected that attempt, saying "[w]hether or not the President has independent power, absent congressional authorization to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers" through the UCMJ. *Hamdan,* 126 S.Ct. at 2774. Likewise here, the President may not disregard limitations that Congress has placed on foreign intelligence surveillance through FISA.

Justice Kennedy's concurring opinion in *Hamdan* further explained why inherent Presidential power did not trump the UCMJ: Through the UCMJ, "Congress, in the proper exercise of its powers as an independent branch of government . . . has . . . set limits on the President's authority." *Id.* at 2799 (Kennedy, J., concurring). *Hamdan* "is not a case, then, where the Executive can assert some unilateral authority to fill a void left by congressional action." *Id.* Under Justice Jackson's formulation in the *Steel Seizure Case*, Congress had, by expressing its will in the UCMJ, put inherent Presidential power over the manner of trying the Guantanamo Bay detainees at "its lowest ebb." *Id.* at 2800. Similarly here, Congress has, by expressing its will in FISA, put inherent Presidential power over authorization of foreign intelligence surveillance at its lowest ebb.

"Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches. Respect for laws derived from the customary operation of the

Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment." *Id.* at 2799. FISA, too, is the result of a deliberate and reflective process engaging both of the political branches, from its 1978 inception to its recent amendments. It cannot be trumped by a Presidential power grab wholly at odds with the constitutional separation of powers.

The constitutional separation of powers is a check on precisely this sort of power grab. "The Framers 'built into the tripartate Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another.'" *Clinton v. Jones*, 520 U.S. 681, 699 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)); *see* James Madison, *The Federalist No. 47* ("The accumulation of all powers . . . in the same hands . . . may justly be pronounced the very definition of tyranny."). Under our system of government, the President is not free to ignore laws properly enacted by Congress. *See United States v. Nixon*, 418 U.S. 683, 715 (1974) (the President is not "above the law"). "It remains one of the vital functions of [the Supreme] Court to police with care the separation of the governing powers. . . . When structure fails, liberty is always in peril." *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring).

This is true even in times of war or emergency: "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. . . . [E]ven the war power does not remove constitutional limitations safeguarding essential liberties." *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425-26 (1934).

Defendants' radically expansive vision of presidential power encroaches not only on Congress's legislative function, but also on the adjudicatory role of this Court, which reflects "the constitutional equilibrium created by the separation of the legislative power to make general law from the judicial power to apply that law in particular cases." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 224 (1995). The adjudicatory role of this Court in the present case includes deciding whether defendants violated FISA when they surveilled plaintiffs without a warrant. If defendants are free to ignore FISA as they deem necessary to protect national security, then they would also be free, at their unfettered discretion, to ignore *a judgment by this Court* that they in fact violated FISA. That would not bode well for the future of the constitutional separation of powers, for it would concentrate too much power in the Executive Branch. "Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the constitution's three-part system is designed to avoid." *Hamdan*, 126 S.Ct. at 2800 (Kennedy, J., concurring).

2. FISA is not an unconstitutional intrusion on executive power.

The White Paper suggests that if the warrantless surveillance program violates FISA, then FISA itself must be an unconstitutional intrusion on the President's Article II "commander in chief" role. The White Paper relies on an obscure bit of dictum in *In re Sealed Case*, 310 F.3d 717, 742 (For. Int. Surv. Ct. 2002), where the court described pre-

FISA authority as saying "that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information" and then commented "[w]e take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power." *See* exh. I, at 8, 30-31, 34-35.

But to say that FISA cannot not encroach on presidential power is not to say that FISA *categorically* does so. No judicial opinion – not even *In re Sealed Case* – has ever held so, and such a holding would run counter to Justice Jackson's prescription in the *Steel Seizure Case* for determining the extent of presidential power where, as here, Congress has acted in an area of concurrent legislative and executive authority. Plainly, the court in *In re Sealed Case* did not mean to say that *any* regulation of foreign intelligence gathering is an unconstitutional encroachment on presidential power, for the court held a portion of FISA constitutional in that very case. *See* 310 F.3d at 746.

The decision cited in *In re Sealed Case* for the proposition that the President has inherent authority to conduct warrantless foreign intelligence surveillance, *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), addressed presidential power before FISA was enacted, as did two other pre-FISA decisions that mention inherent or implied presidential authority. *See United States v. Butenko*, 494 F.2d 593, 603 (3d Cir. 1974), *cert. denied sub nom. Ivanov v. United* States, 419 U.S. 881 (1974); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973). But according to Justice Jackson's prescription in the *Steel Seizure Case*, the President's authority was substantially changed by FISA. Before FISA, "in the absence of either a congressional grant or denial of authority," the President could "rely upon his own independent powers." *Steel Seizure Case*, 343 U.S. at 637. Now that Congress has taken action by enacting FISA, the President's power "is at its lowest ebb," and "he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* The opinion in *In re Sealed Case* cannot reasonably be construed to suggest, as the White Paper would have it, that FISA categorically encroaches on presidential power. The *Steel Seizure Case* says otherwise. The pre-FISA cases mentioning inherent presidential authority are eclipsed by FISA.

If the White Paper were right – that the President has *exclusive* constitutional authority over matters of national security to the exclusion of any legislation like FISA – then the Supreme Court would have held in *Hamdan v. Rumsfeld* that the UCMJ was unconstitutional; yet the Supreme Court held that inherent presidential power did *not* trump the UCMJ. Also unconstitutional would be recent legislation prohibiting torture, 18 U.S.C. §§ 2340-2340A, and the use of cruel, inhuman and degrading treatment by U.S. officials and military personnel, Pub. L. No. 109-148, Div. A, tit. X, § 1003, 19 Stat. 2739-40 (2005); yet the President himself has publicly conceded that "I don't think a President can order torture." *See* Eric Lichtblau & Adam Liptak, *Bush and His Senior Aides Press On in Legal Defense for Wiretapping Program*, N.Y. Times, Jan. 28 2006, at A13. And statutes prescribing rules for governing occupied enemy territory would be unconstitutional; yet the Supreme Court held long ago that such statutes displaced presidential regulations that had governed such territory in the absence of legislation. *See Santiago v. Nogueras*, 214 U.S. 260, 265-55 (1909).

Ultimately, the *In re Sealed Case* dictum says nothing more about FISA than the general truism that Congress may not encroach on presidential power. Justice Jackson's opinion in the *Steel Seizure Case* provides the means for determining whether FISA *does* encroach on presidential power to the extent it requires warrants for foreign intelligence surveillance. Plainly it does not.

D. The Warrantless Surveillance Program Violates The Fourth Amendment.

The Fourth Amendment prohibits indiscriminate domestic electronic surveillance by the government. *See Katz v. U.S.*, 389 U.S. 347, 352-53 (1967). "Federal case law has specifically delineated a fundamental right to privacy in wire communications based on the Fourth Amendment." *Blake v. Wright*, 179 F.3d 1003, 1008 (6th Cir. 1999). The Supreme Court admonished in *Katz*: "Over and over again this Court has emphasized that the mandate of the Fourth Amendment requires adherence to judicial process, and that searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357.

In the so-called *Keith* case, the Supreme Court made clear that this rule applies even to domestic electronic surveillance that is purportedly conducted for national security purposes. *U.S. v. U.S. Dist. Court for Eastern Dist. of Mich.*, 407 U.S. 297, 323-24 (1972) (*Keith*). "These Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. . . . The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook invasions of privacy and protected speech." *Id.* at 316-17.

Thus, separate and apart from FISA, the warrantless surveillance program is unlawful as violating the Fourth Amendment unless it falls within one of the constitutional warrant requirement's "few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357. The White Paper contends the program falls within the "special needs" exception to the Fourth Amendment requirement of a warrant, which allows warrantless searches "in those exceptional circumstances in which special needs, beyond the normal need for law enforcement," make getting a warrant "impracticable." *New Jersey v. T.L.O.*, 469 U.S. 325, 352 (1985); *see* exh. I, at 37-39. But decades of successful experience under FISA – with some 19,000 surveillance applications in 1978-2004 and only four rejections by the FISC – have plainly demonstrated that a warrant requirement is anything but "impracticable." And, of course, in emergency situations, under FISA the Attorney General may authorize warrantless surveillance for up to 72 hours "before an order authorizing such surveillance can with due diligence be obtained." 50 U.S.C. § 1805(f)(1). Congress has already addressed defendants' "special needs" concern by allowing such emergency warrantless surveillance, crafting the exception that defendants say they need and thus eliminating any necessity for a judicially-crafted exception. There is no nonstatutory "special needs" exception to FISA.

Additionally, even under the few specifically established and well-delineated exceptions to the warrant and probable cause requirements, elements exist which are lacking in the warrantless surveillance program. For example, the "special needs" exception has been applied to drunk-driving checkpoints because the stops were brief and minimally intrusive, and requiring warrants and probable cause would defeat the purpose of keeping drunk drivers off the road. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990). School drug testing programs have been upheld on the rationale that students engaging in extra-curricular activity have a diminished expectation of privacy, advance notice, and the opportunity not to participate in such activity. *Vernonia School District v. Action*, 515 U.S. 646 (1995). Similarly, the "special needs" exception has been applied to searches of probationers, *Griffin v. Wisconsin*, 483 U.S. 868 (1987), workers in highly-regulated industries, *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989), and secondary school students, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), because they have lowered expectations of privacy. These elements invoking the "special needs" exception are absent with regard to defendants' warrantless surveillance program, which perpetrates unchecked and unlimited intrusions into private communications, without judicial review, probable cause or any other safeguards, where there are no lowered expectations of privacy.

E. **The Warrantless Surveillance Program Violates The First Amendment.**

The warrantless surveillance program also violates the First Amendment, whose free speech guarantee is implicated whenever courts determine whether a governmental investigation of expressive activity violates the Fourth Amendment's protection against unrestricted searches. *See, e.g., Zurcher v. Standford Daily*, 436 U.S. 547, 564 (1978); *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961) (the Bill of Rights "was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression."). "Abuses of the investigative process may imperceptibly lead to abridgement of protected freedoms." *Watkins v. United States*, 354 U.S. 178, 197 (1957). When "forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public," the effect on the victim "may be disastrous." *Id.*

The Supreme Court cautioned in the *Keith* case that the threat to free speech is particularly acute when the government invokes national security concerns as a justification for electronic surveillance of expressive activity. *Keith*, 407 U.S. at 313-14. "The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power." *Id.* at 314. And the threat is even worse where, as here, the surveillance reaches attorney-client communications, which are encompassed by the First Amendment right of meaningful access to the courts. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *Goodwin v. Oswald*, 462 F.2d 1237, 1241 (2d Cir. 1972).

The First Amendment imposes procedural and substantive limits on such investigations of expressive activity. As a procedural matter, there must be judicial oversight, which is essential to "ensure[] the necessary sensitivity to freedom of expression." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). Executive officials cannot be vested with unilateral, unfettered authority. The government "is not free to adopt whatever procedures it pleases . . . without regard to the possible consequences for constitutionally protected speech." *Marcus*, 367 U.S. at 731.

As a substantive matter, the investigation must be narrowly tailored. "'[J]ustifiable government goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association.'" *In re Grand Jury Proceedings*, 776 F.2d 1099, 1103 (2d Cir. 1985) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 680-81 (1972)).

The warrantless surveillance program is both procedurally and substantively flawed. It vests final, unilateral and unfettered power in an NSA shift supervisor to decide whether to intrude on protected communications, without any judicial oversight and without standards that narrowly tailor the surveillance to the program's purported national security purpose. The program thus violates the First Amendment.

F. The Warrantless Surveillance Of Plaintiffs Violates The International Covenant On Civil And Political Rights.

Finally, the warrantless surveillance program as applied to plaintiffs violates the International Covenant on Civil and Political Rights (1976) [hereinafter, "1976 Covenant"]. Article 17 of the 1976 Covenant provides that "[n]o one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence" and "[e]veryone has the right to the protection of the law against such interference." The United Nations Human Rights Committee, the entity entrusted with interpreting the 1976 Covenant, has stated that the "term 'unlawful' means that no interference can take place except in cases envisaged by the law. Interference authorized by States only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant." General Comment 16(3) to the 1976 Covenant.

This provision of international human rights law is made enforceable in U.S. courts by the International Convention for the Suppression of the Financing of Terrorism (1999) [hereinafter, "1999 Convention"]. Under a provision in Article 8 of the 1999 Convention, one of the measures mandated for suppressing the financing of terrorism is "the identification, detection and freezing or seizure of any funds used or allocated for the purposes" of financing terrorism. That provision encompasses plaintiffs' surveillance. Article 17 of the 1999 Convention provides that any person as to whom such measures are taken "shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with . . . international human rights law."

The 1999 Convention has been implemented by federal legislation. See 18 U.S.C. § 2339C. Consequently, the U.S. courts are required to give it effect. Restatement (Third) of Foreign Relations Law § 111(3) (1987). This means a person may, as plaintiffs do here, assert rights under the 1999 Convention in a private judicial action. Restatement (Third) of Foreign Relations Law § 907(1).

Plaintiffs' rights under the 1999 Convention include the 1976 Covenant's protection against unlawful interference with privacy and correspondence. Thus, plaintiffs' warrantless surveillance in violation of FISA, the constitutional separation of powers, the Fourth Amendment and the First Amendment also violates international law as implemented by legislation.[1]

III.

ABSENT PARTIAL SUMMARY JUDGMENT OF LIABILITY, THIS COURT SHOULD SUMMARILY ADJUDICATE ISSUES WITHIN PLAINTIFFS' CLAIMS.

The foregoing discussion demonstrates that plaintiffs are entitled to a partial summary judgment of liability pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, so that the only issues that need to be tried pertain to the quantum of plaintiffs' damages. Alternatively, if this Court denies partial summary judgment of liability, the Court should make an order specifying the facts set forth in paragraphs 1 through 6 in Plaintiffs' Concise Statement of Material Facts to be without substantial controversy and then summarily adjudicate the legal issues presented by plaintiffs' FISA, constitutional and international law claims, as authorized by Rule 56(d) of the Federal Rules of Civil Procedure.

Partial summary adjudication of these purely legal issues is the most efficient way for this Court to proceed (absent a partial summary judgment of liability), because it will either put an immediate end to this case or streamline the case for limited discovery and trial. On the one hand, if this Court addresses these legal issues now and determines that defendants are right in claiming that the warrantless surveillance program is authorized by the AUMF and inherent presidential power, then this litigation will immediately terminate (subject to appellate review) without any need for discovery or trial – an approach that defendants should welcome. On the other hand, if this Court summarily adjudicates these legal issues in plaintiffs' favor, then the beneficial effect will be "to carve out threshold claims and thus streamline further litigation" by "efficiently separat[ing] the legal issues from the factual ones," *Continental Airlines, Inc.*, 819 F.3d at 1525, so that the case may proceed to limited discovery and trial on the few disputed fact issues that are presented.

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[1]This motion does not address one of plaintiffs' claims for relief – the claim for violating the Sixth Amendment. *See* Complaint, at 6. That claim will not be appropriate for partial summary judgment or adjudication unless and until plaintiffs are able to conduct discovery on whether they were surveilled during the pendency of criminal proceedings against plaintiff Al-Haramain Islamic Foundation, Inc.

CONCLUSION

For the foregoing reasons, this court should grant a partial summary judgment of liability or, alternatively, should summarily adjudicate specific issues within plaintiffs' claims.

DATED this 30th day of October, 2006.

/s/ Jon Eisenberg
JON EISENBERG, CALIF. BAR #. 88278
LISA JASKOL, CALIF. BAR #. 138769
STEVEN GOLDBERG, OSB# 75134
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ZAHA S. HASSAN, OSB# 97062

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that I am over the age of 18 years, not a party to the cause. My business address is 180 Montgomery Street, Suite 2200, San Francisco, California 94104.

On March 28, 2007, I caused the foregoing documents:

- **RESPONSE OF APPELLEES TO APPELLANTS' MOTION FOR STAY OF THE DISTRICT COURT'S MARCH 13, 2007 ORDER, ETC. AND FOR AN IMMEDIATE, INTERIM STAY, ETC.**

to be served on:

Douglas N. Letter
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by delivering them to Federal Express for delivery the next day.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 28th day of March, 2007, at San Francisco, California.

Mary B. Cunniff